

STATE OF SOUTH CAROLINA
BEFORE THE PUBLIC SERVICE COMMISSION

DOCKET NO. 2019-185-E
DOCKET NO. 2019-186-E

In the Matter of:)
 South Carolina Energy Freedom Act)
 (H.3659) Proceeding to Establish)
 Duke Energy Carolinas, LLC's)
 Standard Offer, Avoided Cost)
 Methodologies, Form Contract)
 Power Purchase Agreements,)
 Commitment to Sell Forms, and Any)
 Other Terms or Conditions)
 Necessary (Includes Small Power)
 Producers as Defined in 16 United)
 States Code 796, as Amended) - S.C.)
 Code Ann. Section 58-41-20(A),)
)
 and)
)
 South Carolina Energy Freedom Act)
 (H.3659) Proceeding to Establish)
 Duke Energy Progress, LLC's)
 Standard Offer, Avoided Cost)
 Methodologies, Form Contract)
 Power Purchase Agreements,)
 Commitment to Sell Forms, and Any)
 Other Terms or Conditions)
 Necessary (Includes Small Power)
 Producers as Defined in 16 United)
 States Code 796, as Amended) - S.C.)
 Code Ann. Section 58-41-20(A))

PARTIAL PROPOSED ORDER OF THE
SOUTHERN ALLIANCE FOR CLEAN
ENERGY AND SOUTH CAROLINA
COASTAL CONSERVATION LEAGUE

I. PROCEDURAL BACKGROUND

This matter comes before the Public Service Commission of South Carolina (“Commission”) pursuant to the provisions of Section 210 of the Public Utility Regulatory Policies Act of 1978 (“PURPA”), 18 U.S.C. § 824a-3, and the Federal Energy Regulatory Commission (“FERC”) regulations implementing those provisions, which delegate to this Commission certain responsibilities for determining each utility’s avoided costs with respect to rates for purchase from qualified cogenerators and small power production facilities. These proceedings are also held pursuant to S.C. Code Ann. § 58-41-20(A) of the South Carolina Energy Freedom Act (“Act 62” or “EFA”).

By letter dated August 14, 2019, Duke Energy Carolinas, LLC (“DEC”) and Duke Energy Progress, LLC (“DEP”) (together, “the Companies” or “Duke Energy”) filed an application to the Commission for approval of the Companies’ standard offer avoided cost methodologies, form contract power purchase agreements, and commitment to sell forms.

The South Carolina Solar Business Alliance, LLC (“SBA”), Johnson Development Associates, Inc. (“JDA”), the Southern Alliance for Clean Energy (“SACE”) and South Carolina Coastal Conservation League (“CCL”) (together, the “Conservation Groups”), Ecoplexus, Inc. (“Ecoplexus”), the South Carolina Energy Users Committee (“SCEUC”), and Walmart, Inc. (“Walmart”) intervened. Central Electric Power Cooperative sought to intervene but later withdrew its petition to intervene in the proceeding. The South Carolina Office of Regulatory Staff (“ORS”) is automatically a party pursuant to S.C. Code Ann. § 58-4-10(B) (2015).

Pursuant to S.C. Code Ann. § 58-41-20(I), on September 3, 2019, the Commission retained Power Advisory, LLC (“Power Advisory”) as its qualified, independent third party consultant.

The Commission convened a hearing on this matter on October 21 through 22, 2019 with the Honorable Comer H. Randall, Chairman, presiding. On November 1, 2019, Power Advisory filed the “Independent Third Party Consultant Final Report Pursuant to South Carolina Act 62” (“Power Advisory Report”) presenting its independently derived conclusions as to DEP and DEC’s calculations of avoided costs as well as other aspects of Act 62 implementation.

On November 8, 2019, JDA and SBA, Duke Energy, and the Conservation Groups filed comments in response to the Power Advisory Report. Also on November 8, 2019, JDA and SBA, ORS, and Duke Energy filed proposed orders. On November 12, 2019, SACE and CCL filed their proposed order.

The Commission made its initial ruling in these dockets at its November 15, 2019 Commission Business Meeting. On December 30, 2019, the Commission issued an “Order Approving Duke Energy Carolinas, LLC’s and Duke Energy Progress LLC’s Standard Offer Tariffs, Avoided Cost Methodologies, Form Contract Power Purchase Agreements, and Commitment to Sell Forms”, Order No. 2019-881. On January 2, 2020, the Commission issued an “Amended Order Approving Duke Energy Carolinas, LLC’s and Duke Energy Progress LLC’s Standard Offer Tariffs, Avoided Cost Methodologies, Form Contract Power Purchase Agreements, and Commitment to Sell Forms”, Order No. 2019-881(A) (“Amended Avoided Cost Order”).

On January 13, 2020, JDA and SBA filed a “Petition for Clarification, Reconsideration and/or Rehearing of Order No. 2019-881(A)”, The Conservation Groups filed a “Petition for

Reconsideration and/or Rehearing of Order No. 2019-881(A)”, and Duke Energy filed a “Petition for Reconsideration of Order No. 2019-881(A).” On January 22, 2020, JDA and SBA, and the Conservation Groups filed responses to Duke Energy’s petition for reconsideration, and Duke Energy filed a response to JDA and SBA, and the Conservation Groups’ petitions for reconsideration or rehearing. ORS also filed a letter in response to the parties’ petitions for reconsideration. On January 24, 2020, the Conservation Groups filed an “Amended Petition for Reconsideration or Rehearing.”

On January 30, 2020, the Commission issued a Directive ruling on the petitions for reconsideration or rehearing. The Directive denied reconsideration on DEC and DEP’s request that the Commission reconsider its consideration and use of Power Advisory’s work product and stated that the Commission “is entitled to consider the report of the Commission’s independent, third-party consultant.”¹

II. STANDARD OF REVIEW

Pursuant to S.C. Code Ann. Section 58-27-2150, a party may petition the Commission for reconsideration or rehearing in respect to any matter determined in the proceeding. “The purpose of a petition for rehearing and/or reconsideration is to allow the Commission the discretion to rehear and/or reexamine the merits of issued orders pursuant to legal or factual questions raised about those orders by parties in interest, prior to a possible appeal.” *In re: South Carolina Electric & Gas Co.*, Order No. 2013-5 (Feb. 14, 2013).

A petition for rehearing or reconsideration must include: “(a) [t]he factual and legal issues forming the basis for the petition; (b) [t]he alleged error or errors in the Commission

¹ Public Service Commission of South Carolina Commission Directive, (Jan 30, 2020) Docket Nos. 2019-185-E, 2019-186-E.

order; [and] (c) [t]he statutory provision or other authority upon which the petition is based.”
S.C. Code Ann. Regs. § 103-825(A)(4).

III. APPLICABLE LAW

Act 62, designed to encourage renewable energy and independent power production, requires that at least once every twenty-four months, the Commission shall approve each electrical utility’s standard offer, avoided cost methodologies, form contract power purchase agreements, commitment to sell forms, and any other terms or conditions necessary to implement Act 62. S.C. Code Ann. § 58-41-20(A). Act 62 provides that any decision by the Commission:

[S]hall be just and reasonable to the ratepayers of the electrical utility, in the public interest, consistent with PURPA and the Federal Energy Regulatory Commission’s implementing regulations and order, and nondiscriminatory to small power producers; and shall strive to reduce the risk placed on the using and consuming public.

Id. Act 62 further requires that in these proceedings, “the commission shall treat small power producers on a fair and equal footing with electrical utility-owned resources” by ensuring that “rates for the purchase of energy and capacity *fully and accurately* reflect the electrical utility’s avoided costs” *Id.* § 58-41-20(B)(1) (emphasis added). The Act directs that power purchase agreements, including terms and conditions, “are commercially reasonable” and consistent with PURPA, and that each electrical utility’s avoided cost methodology “fairly accounts” for costs avoided or incurred “including, but not limited to energy, capacity, and ancillary services” for small power producers, including “those utilizing energy storage equipment.” *Id.* § 58-41-20(B)(2),(3).

Act 62 requires Commission decisions in avoided cost dockets to be consistent with PURPA, and the Federal Energy Regulatory Commission’s implementing regulations and orders. S.C. Code Ann. § 58-41-20(A).

The EFA also directs the Commission to “engage, for each utility, a qualified independent third party to submit a report that includes the third party’s independently derived conclusions as to that third party’s opinion of each utility’s calculation of avoided costs for purposes of proceedings conducted pursuant to this section.” S.C. Code Ann. § 58-41-20(I). Pursuant to Act 62, “[t]he qualified independent third party’s duty will be to the commission.” *Id.* Act 62 further provides that, “[a]ny conclusions based on the evidence in the record and included in the report are intended to be used by the commission along with all other evidence submitted during the proceeding to inform its ultimate decision setting the avoided costs for each electrical utility.” *Id.* The Commission retained Power Advisory, LLC, as its independent third party consultant pursuant to the EFA.

IV. REVIEW OF DUKE ENERGY’S PETITION AND RESPONSES REGARDING THE POWER ADVISORY REPORT

A. Consideration of the Power Advisory Report in Commission’s Order 2019-881(A)

The Commission’s Amended Order on Avoided Costs explained that the Commission “appropriately considered Power Advisory’s conclusions based on the evidence in the record to inform the Commission’s ultimate decision in setting DEC’s and DEP’s avoided cost rates as well as other Commission determinations in these proceedings.”² The Amended Order discussed Power Advisory’s recommendations on various issues, including the need for Duke Energy to provide additional analytical support for avoided cost rate periods,³ the reasonableness of Duke Energy’s application of the peaker methodology,⁴ and the necessity that QFs should be provided extensions on their in-service dates for any delays associated with interconnection facilities and

² Amended Order on Avoided Costs at 26-27.

³ *Id.* at 75.

⁴ *Id.* at 58

network upgrades.⁵ However, the Commission did not adopt all of Power Advisory's recommendations, and exercised its own independent judgment in light of the evidence on the record.⁶

1. Duke Energy's Petition for Reconsideration

Duke Energy's Petition for Reconsideration argued that portions of the Power Advisory Report should be stricken from the Report and not included in the record of these proceedings.⁷ Duke Energy argued that four sections of the Power Advisory Report included facts and information not admitted into the evidentiary record of the proceedings, and that therefore the entirety of these four sections should be stricken.⁸ Duke Energy asserted that allowing this evidence into the record violated ex parte prohibitions and exceeded the role of the independent expert contemplated by Act 62.⁹

2. The Conservation Groups' Response to Duke Energy's Request for Reconsideration

SACE and CCL's Response to Duke Energy's Petition for Reconsideration argued that the Commission should deny Duke Energy's request to strike large portions of the Power Advisory Report.¹⁰ The Conservation Groups explained that Duke Energy's request to strike portions of the Report a full two months after the Report was filed and without a formal motion to strike, was improper and untimely under S.C. Code of Reg. § 103-829. They noted that Dominion Energy South Carolina filed a Motion to Strike the independent advisory report in

⁵ *Id.* at 127.

⁶ *See, e.g.*, Amended Avoided Cost Order at 90.

⁷ Petition of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC for Reconsideration of Order No. 2019-881(A) 4, Docket Nos. 2019-185-E, 2019-186-E (Jan. 13, 2020) ("hereinafter Duke Energy's Petition for Reconsideration").

⁸ *Id.*

⁹ *Id.* at 3.

¹⁰ Southern Alliance for Clean Energy and South Carolina Coastal Conservation League's Response to Duke Energy's Petition for Reconsideration, Docket Nos. 2019-185-E, 2019-186-E (Jan. 22, 2020) (hereinafter "SACE and CCL's Response").

Docket No. 2019-186-E on November 8, 2019, and that the Commission properly denied that motion in its order issued December 9, 2019.¹¹

The Conservation Groups further argued that even if Duke Energy's attempts to strike the Power Advisory Report were timely—which they were not—the Companies' request was overbroad.¹² The Conservation Groups explained that Duke Energy's request was overly broad, seeking to strike entire sections of the Report based on information contained in a couple of footnotes or one figure.¹³ The Conservation Groups noted that the majority of the sections Duke Energy sought to strike simply contained a discussion of the parties' testimony, which is plainly part of the record.¹⁴

Finally, the Conservation Groups explained that even if certain information should not have been included in the Power Advisory Report, any such error was harmless because the Commission did not actually rely on any of the allegedly offending information.¹⁵ The Conservation Groups pointed out that on some issues, such as contract term length and required permits and land use approvals, the Commission's order did not mention the Power Advisory Report at all.¹⁶ On other issues, such as the 365 day commercial operation date, the Commission referenced Power Advisory's findings, but grounded its findings and conclusions in the order in testimony presented by the parties.¹⁷

¹¹ *Id.* at 3.

¹² *Id.* at 4.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 5.

¹⁶ *Id.* at 5; Amended Order on Avoided Costs at 153-67, 145-46.

¹⁷ SACE and CCL's Response at 5; Amended Avoided Cost Order at 151.

B. JDA and SBA's Response to Duke Energy's Petition for Reconsideration

JDA and SBA's Response to Duke Energy's Petition for Reconsideration also opposed the Companies' request to strike portions of the Power Advisory Report from the record.¹⁸ JDA and SBA pointed out that Duke Energy's request to strike portions of the Report was untimely and procedurally improper.¹⁹ JDA and SBA further asserted that the information Duke Energy identified as problematic consisted entirely of publicly-available documents that would be the proper subject of judicial notice.²⁰ JDA and SBA also explained that Duke Energy's Petition for Reconsideration did not explain how Power Advisory's reliance on this information contributed to any error in the Amended Avoided Cost Order's Findings of Fact or Conclusions of Law.²¹ JDA and SBA further noted that Duke Energy's asserted Due Process concerns were unfounded because the Companies had ample opportunity—and in fact did—respond to the Power Advisory Report.²² Finally, JDA and SBA explained that Duke Energy's citations to Act 62 in support of its argument were selective and failed to consider other relevant portions of the statute, which demonstrate that Power Advisory was permitted and even expected to bring its independently derived knowledge and expertise to bear on the issues in these proceedings.²³

V. FINDINGS OF FACT

1. The Power Advisory Report was provided to all parties on November 1, 2019.
2. All parties had an opportunity to respond, and Duke Energy responded substantively to the Power Advisory Report on November 8, 2019.

¹⁸ Response in Opposition to the Petition of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC for Reconsideration of Order No. 2019-881(A), Docket Nos. 2019-185-E, 2019-186-E (Jan. 22, 2020) (hereinafter "JDA and SBA's Response").

¹⁹ *Id.* at 3.

²⁰ *Id.* at 2.

²¹ *Id.* at 3.

²² *Id.* at 4.

²³ *Id.* at 6-7.

3. Duke Energy never filed a motion to strike portions of the Power Advisory Report in the proceeding and did not request to strike portions of the report until its Petition for Reconsideration, filed on January 13, 2020.
4. Duke Energy requested to strike whole portions of the Power Advisory Report, but the allegedly offending information was far more limited in scope.

VI. CONCLUSIONS OF LAW

The Commission finds and concludes that Duke Energy's request to strike portions of the Power Advisory Report is without merit, and that the Commission's consideration of Power Advisory's recommendations is appropriate and in compliance with the legal requirements of Act 62. Duke Energy's request to strike is untimely, improper, and overbroad. Moreover, the Commission did not rely on the information that Duke Energy seeks to strike in reaching its conclusions based on evidence in the record of these proceedings. Finally, as provided in Act 62, the Commission's independent advisor is permitted, and in fact required, to include their "independently derived conclusions" in their report.

IT IS THEREFORE ORDERED THAT:

Duke Energy's Petition for Reconsideration is denied as to the Commission's reliance on the Power Advisory Report.

Respectfully submitted this 14th day of February, 2020.

/s/ Lauren J. Bowen

Lauren J. Bowen
Admitted Pro Hac Vice
Southern Environmental Law Center
601 West Rosemary Street, Suite 220
Chapel Hill, NC 27516
Telephone: (919) 967-1450
lbowen@selcnc.org

/s/ J. Blanding Holman IV

J. Blanding Holman IV
SC Bar No. 72260
Southern Environmental Law Center
525 East Bay Street, Suite 200
Charleston, SC 29403
Telephone: (843) 720-5270
bholman@selcsc.org

*Attorney for South Carolina
Coastal Conservation League and
Southern Alliance for Clean Energy*